Supreme Court, U.S.
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No. 95-995

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

MURPHEY FAVRE, INC.,
WASHINGTON MUTUAL SAVINGS BANK,
GREGORY ONDRAK, JAMES ROYAN and
DOUGLAS SPRINGER,

Petitioners,

v.

PAUL M. LYNN, on behalf of himself and
all similarly situated persons, and THE DISTRICT
COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF MONTANA, IN AND FOR THE
COUNTY OF MISSOULA, THE HONORABLE
JOHN S. HENSON, PRESIDING JUDGE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF MONTANA

REPLY BRIEF FOR PETITIONER

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I. INTRODUCTION

In accordance with Supreme Court Rule 15.6, Petitioners respectfully submit this reply brief to address certain assertions in Respondent's Brief in Opposition ("Respondent's Brief").

Respondent Lynn ("Respondent") makes irrelevant legal arguments which do not deal with the issues actually raised by the Petition and relies on factual assertions that either miss the point or should be disregarded because they have no support in the record before this Court. Despite Respondent's misdirection, this Court should grant *certiorari* to prevent the further disregard of the strong federal policies favoring the finality of negotiated class action settlements and the constitutional dictates of the Full Faith and Credit clause.

II. FACTUAL BACKGROUND

To clarify the record, Petitioners respond below to some of the incorrect and unsupported factual assertions made in Respondent's Brief. Petitioners also request that the Court disregard any factual assertions made by Respondent which are not supported by the record before the Court.

A. Montana Bond Purchasers Were at All Times Members of the Class in the Washington Action.

Respondent contends that the class in the Washington Action was "expanded" to include Montana bond purchasers on the eve of settlement. Respondent's Brief at 5. Respondent cites no factual support for this assertion, nor could he do so, because the assertion is false. The class definition in the Washington Action included *all* purchasers of Homestead bonds, regardless of their state of residence, from the inception of that case through its

settlement. *See* Appendix 152a-53a, 161a, 167a, 171-72a.[1]

Respondent also mischaracterizes the scope of the Washington court's Final Judgment, arguing that it was limited to "those Montana investors who had expressly elected to join in the Washington Action." Respondent's Brief at 8. The Washington court expressly considered "a comparison of the potentially applicable provisions of Montana law and Washington law" and concluded that the settlement was "fair, reasonable and adequate to *all members* of the Class, including, without limitation, Montana Homestead Bond purchasers." Appendix 13a (emphasis added); *see also* Appendix 25a. Likewise, the Washington court concluded it had personal jurisdiction over "all Class Members," drawing no distinction between those who had or had not filed a claim. Appendix 14a, 152a-53a ("Class Members" means all persons in the Class "but excludes any Person who submits a valid and Timely request for exclusion"). Thus, the Final Judgment dismissed the claims of all "Class Members" – i.e., all bond purchasers except the named plaintiffs in the Montana Action, who were the only "opt outs."

B. No Member of the Washington Class Has Challenged the Washington Court's Jurisdiction.

Respondent claims to have filed an opt-out request for *all* Montana bond purchasers. Respondent's Brief at 5. But Respondent must admit that the Washington court ruled he lacked standing to do so because he presented no evidence of authority to exercise the right to opt out

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[1] Respondent's claim that the Washington and Montana actions "were *not* the same" (Respondent's Brief at 3) is also less than candid. The original complaint in the Montana Action was never served on Petitioners, and the subsequent versions of the Montana complaint were amended to include virtually identical claims as those made in the Washington Action.

on behalf of anyone other than himself. Appendix 25a. No *other* Montana bond purchaser has yet questioned the Washington court's jurisdictional ruling. In contrast, Respondent has challenged the Washington court's jurisdiction before *both* the Washington and the Montana courts. Appendix 64a-66a.

III. LEGAL ARGUMENT

A. The Montana Supreme Court's Dismissal Order Is an Immediately Reviewable Final Judgment.

Respondent spends much of his argument attempting to show that the September 26, 1995 order entered by the Montana Supreme Court (the "Dismissal Order") is not a final judgment ripe for review by this Court. Respondent's Brief at 14-21. Respondent is wrong for at least two reasons.

First, Respondent is wrong because directly applicable precedent from this Court holds that an order which terminates original proceedings seeking a Writ of Supervisory Control before the Montana Supreme Court constitutes a final judgment. *Fisher v. District Court of 16th Judicial Dist.*, 424 U.S. 382, 385 (1976). In *Fisher,* this Court set forth three compelling reasons why *certiorari* is available to review an order terminating interlocutory writ proceedings before the Montana Supreme Court. *First,* a Writ of Supervisory Control is available only in original proceedings before the Montana Supreme Court. *Id.* at 385 n.7. *Second,* the order terminating those writ proceedings is not equivalent to an appeal from the underlying case. *Id. Third,* "[a] judgment that terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court, is final, *even if further proceedings are to be had in the lower court.*" *Id.* (emphasis

added). Whether an order grants or denies the requested writ has nothing to do with whether it finally terminates the proceedings before the appellate court. *Fisher* is dispositive authority establishing that the Dismissal Order may be reviewed now.

Second, Respondent is wrong because his main authority for the argument that this case is not appropriate for review is completely inapplicable here. *See* Respondent's Brief at 16-19 (citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)). Like *Fisher*, *Cox* arose under the predecessor to the current statute governing this Court's jurisdiction. But *Fisher* arose under this Court's certiorari jurisdiction, and that provision (former 28 U.S.C. §1257(3) (1970)) was carried forward almost entirely into the current statute. *Fisher*, 424 U.S. at 385 n.7; *see* 28 U.S.C. §1257(a) (1988). *Cox* came before this Court under the provision concerning this Court's *appellate* jurisdiction over state court proceedings (former 28 U.S.C. §1257(2) (1970)). *Cox*, 420 U.S. at 476. The section interpreted by *Cox* was eliminated in the 1988 amendments. *See* 28 U.S.C. §1257 (1988). Therefore, *Cox* is completely irrelevant to this case and carries no precedential value whatsoever.[2]

Under *Fisher*, there is no question that the Dismissal Order is a final judgment which may be reviewed by this Court now. Thus, the question before the Court is whether the Full Faith and Credit issues presented in this

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[2] Like the citation of *Cox*, Respondent's reliance on the first denial of *certiorari* in *Shutts* is misplaced. *See Phillips Petroleum Co. v. Duckworth*, 459 U.S. 1103 (1983) (denying *certiorari* without opinion). Nothing in the Court's memorandum opinion or its later decision suggests that the order of the Kansas Supreme Court denying the requested writ of mandamus was not a *final* judgment. *Id.*; *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 801 (1985). The decisions merely recite, without explanation, the fact that *certiorari* was denied.

case are sufficiently important to merit immediate review.[3]

B. Respondent Cannot Act as a Class Representative Because He Is Bound by the Washington Court's Jurisdictional Rulings.

Respondent attempts to modify the questions presented in the Petition to focus on the rights of absent class members to collaterally attack a foreign court's jurisdictional ruling. *See, e.g.*, Respondent's Brief at (*i*). Respondent's new questions are hypothetical and irrelevant because no Montana bond purchaser who remained in the Washington settlement class has ever challenged the Washington court's jurisdiction to enter the Final Judgment. This case involves the ability of *Respondent*, who voluntarily litigated and lost the jurisdiction issue before the Washington court, to relitigate that issue in the Montana courts.

Respondent cannot dispute his actual participation in the Washington Action. Respondent's motion to dismiss the claims of *all* Montana bond purchasers prompted the Washington court's ruling that it had jurisdiction over the absent class members. Appendix 20a-21a. Respondent admits the single fact that demonstrates why he cannot serve as a class representative: "The Washington Court ruled that the Washington settlement was enforceable against the Montana investors who had not 'opted out' of that case." Respondent's Brief at 8-9; *see also*

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[3] Respondent also improperly relies on *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). *Livesay* establishes that a federal district court's order decertifying a class may not be an appropriate subject for interlocutory review under 28 U.S.C. §1291. *Id.* at 465. But this case involves a final order from the highest court of a state on an issue concerning the lower court's jurisdiction to hear the class action case *at all*. *Fisher* makes the Dismissal Order the proper subject of a *certiorari* petition; *Livesay* is simply inapplicable.

Appendix 13a-15a, 152a-53a. Once the Washington court entered its Final Judgment, the Full Faith and Credit clause required the Montana courts to defer to the Washington court's rejection of Respondent's jurisdictional objections. *See Durfee v. Duke*, 375 U.S. 106, 111 (1963) (citing U.S. Const. art. IV, §1).

Respondent's own brief explains why *Durfee* is dispositive of the Full Faith and Credit issues:

> *Durfee* involved two attacks, direct and collateral, against the jurisdiction of the judgment rendering court, both brought by the identical party. *Durfee*, 375 U.S. at 110.

Respondent's Brief at 21-22. So does this case. Respondent litigated and lost his jurisdictional challenges in Washington. Rather than appealing the Washington court's rulings, Respondent then went forum shopping and *relitigated* those very same issues by seeking class certification in Montana. *Durfee* and the doctrine of jurisdictional finality prohibit Respondent from undertaking this transparent attempt to evade the outcome of his motion before the Washington court.

Respondent argues that the doctrine of jurisdictional finality explicated in *Durfee* does not apply to him because the Washington court ruled that he lacked standing to act on behalf of Montana bond purchasers. Respondent's Brief at 22-23. Respondent misses the point again. By availing himself of the opportunity to contest jurisdiction before the Washington court, Respondent consented to entry of a determination that would be binding on him. *Durfee*, 375 U.S. at 111. Any result other than this would eviscerate the Full Faith and Credit clause, leaving it to be largely flouted in the context of multistate class action litigation.

Respondent's focus upon the rights of "absent class members" is a red herring. The Montana courts allowed Respondent to act as a class representative when he was precluded from challenging the Washington court's jurisdiction to enter the Final Judgment. In doing so, the Montana courts failed to afford Full Faith and Credit to the Washington court's rejection of Respondent's jurisdiction objections. Intervention by this Court is appropriate to correct this disregard of the Full Faith and Credit clause.

C. Petitioners' Constitutional Claims Are Ripe for Consideration.

Respondent argues that review of the Dismissal Order now is premature for essentially two reasons. First, Respondent claims that the Montana courts have not yet ruled on the jurisdictional issue. Respondent's Brief at 19. Second, Respondent asserts that *certiorari* should not be granted because subsequent proceedings in the trial court may render the issue moot. Respondent's Brief at 24. These arguments mischaracterize the proceedings below and improperly minimize the prejudice to Petitioners as a result of the rulings below.

Respondent's argument that the Montana courts have not actually addressed the Washington court's jurisdiction over the Montana bond purchasers is inconsistent with the impact of the Certification Order and the Dismissal Order. The Montana trial court resuscitated the claims extinguished by the Washington court's Final Judgment and gave the Montana bond purchasers a new option — i.e., rescission of the Washington releases in favor of participation in the Montana Action. Appendix 7a. The Dismissal Order kept those claims alive by allowing the Montana Action to proceed to judgment as a class action. Appendix 1a-2a. In each case, Petitioners raised and

argued the Full Faith and Credit implications of the Final Judgment on the Montana courts' rulings. *See, e.g.*, Appendix 28a-42a, 43a-91a. In each case the Montana courts disregarded those arguments. Because the Petition presents jurisdictional issues, *certiorari* is proper even though the case on the merits will proceed below. *Fisher*, 424 U.S. at 385; *see also Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 31 (1916) (state supreme court's order dismissing writ of prohibition was a final judgment; the "fact that it does not decide the merits . . . is immaterial . . . [because] [i]t is not devoted to that point, but only the preliminary question of the jurisdiction of the court in which that suit is brought.").

Fisher is also a sufficient answer to Respondent's contention that the jurisdiction issue may be rendered moot by later proceedings in the Montana *trial court*. The constitutional violation complained of here by Petitioners was complete upon entry of the Dismissal Order by the Montana Supreme Court. The proceedings before the Montana Supreme Court in which the Dismissal Order was entered are over, and no further proceedings will occur. The possibility that further *trial court* proceedings may occur is simply irrelevant. *Fisher*, 424 U.S. at 385.[4]

D. Immediate Review Will Further Strong Public Policies.

Perhaps the most surprising assertion made by Respondent is that "Petitioners have made no argument

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[4] Even if the trial court proceedings were relevant, Respondent presents nothing other than speculation to support his mootness argument. *See, e.g.*, Respondent's Brief at 24 ("[S]everal events may occur . . . ."). The Montana trial court has already rejected the Full Faith and Credit arguments by entering the Certification Order. Appendix 3a-10a. This issue, which is separate and distinct from the merits of the named plaintiffs' claims, is ripe for review now.

that there is a strong federal policy to be supported by grant [sic] of *certiorari* . . . ." Respondent's Brief at 20. Petitioners have brought this matter before the Court because it involves a public policy embedded in the system of federalism set forth in the U.S. Constitution. The requirement that the courts of one state respect and give preclusive effect to judgments entered in the courts of another state is "central to our system of jurisprudence." *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 703-04 (1982). This policy of jurisdictional finality is critically important because it eliminates the "uncertainty, confusion, and delay that necessarily accompany relitigation of the same issue." *Id.* This policy is at the heart of the Petition. *See, e.g.*, Petition at 13-21.

Likewise, the Montana courts' disregard of the Washington court's Final Judgment violates the strong federal public policy in favor of enforcing negotiated settlements in class actions. *Air Line Stewards & Stewardesses Ass'n v. Trans World Airlines, Inc.*, 630 F.2d 1164, 1166-67 (7th Cir. 1980), *aff'd sub nom. Zipes v. Trans World Airlines*, 455 U.S. 385 (1982). Both of these policies seek to conserve the scarce resources of the judiciary and the parties by allowing one fair opportunity to resolve a dispute, but precluding the proverbial "second bite at the apple." Every single member of the Washington settlement class was given the opportunity to request exclusion. Appendix 12a-13a, 183a. By failing to do so, the Montana bond purchasers elected to accepted the benefits of the Washington settlement and to forego further pursuit of their claims. Not one person has expressed a desire to revisit that decision, except Respondent, who has already had his day in court. Further litigation by Respondent on this question is unnecessary and is *precisely* the outcome prohibited by the public policies this Court must enforce.

IV. CONCLUSION

Respondent's Brief attempts to gloss over two critical facts: (1) Respondent Lynn has already litigated and lost the issue of whether the Washington court had jurisdiction over absent class members, and (2) the Washington court entered a Final Judgment dismissing the claims of all purchasers of Homestead Bonds who did not expressly opt out of the Washington Action. These two facts preclude Respondent from seeking class certification in the Montana Action. By correcting the Montana courts' failure to afford preclusive effect to the Washington court's Final Judgment, this Court will affirm the vitality of the Full Faith and Credit clause and reinforce the finality of negotiated settlements in multistate class actions.

Petitioners therefore respectfully request *certiorari* be granted in this matter.

Respectfully submitted,

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